PETITION FOR CERTIORARI

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER

IN THE

Supreme Court of the United States

71-992

No. _____

ROBERT WOLLACK, JR.

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Frederick T. Stant, Jr.
STANT & STANT
1230 Virginia National
Bank Building
Norfolk, Virginia 23510

Counsel for Petitioner

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SUPREME COURT OF THE UNITED STATES

No.

ROBERT WOLLACK, JR.

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner, Robert Wollack, Jr., prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit rendered in these proceedings on January 5, 1971.

OPINION BELOW

The decision of the United States Court of Appeals for the Second Circuit affirming a judgment of conviction entered on a jury verdict in the United States District Court for the Southern District of New York was rendered without opinion and has not been reported.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit was entered on January 5, 1972. The jurisdiction of this Court is invoked under Title 28, U.S.C. §1254 (1). The time for filing the petition will expire on February 4, 1972.

QUESTIONS PRESENTED

1. If an indictment, filed June 22, 1971, charges a conspiracy continuing from January 1, 1970 up to and including the date of the indictment in violation of Title 26 U.S.C. §4705(a) and §7237(b), a statute repealed effective May 1, 1971, and replaced by Title 21 U.S.C. §§801 et seq, may defendant be tried and convicted for violating the repealed statute, and then sentenced under its provisions, when the repealed statute provides far greater penalties than the replacing statute.

2. Does the presence of a "bugged" Government informer at a consultation between a defendant and his attorney deny that defendant his Sixth Amendment right to counsel when the entire attorney-client consultation is recorded and used as evidence against the defendant at trial.

3. Once a qualified juror has been seated, absent misconduct or physical or mental inability to continue, may a Trial Judge discharge the juror and substitute an alternate juror when, two days into the prosecution's case, the juror states he has reached an irrevocable verdict?

4. Does Title 18 U.S.C. §§2510 et seq require judicial order authorizing the interception of an oral communication before that communication may be used as evidence?

STATUTE INVOLVED

The constitutional provisions, statutes, and Federal Rules of Criminal Procedure involved, too lengthy for inclusion at this point, appear in an "Appendix" to this petition and are as follows:

1. Amendments IV, V, VI.

2. 26 United States Code, Sections 4705(a) and 7237(b).

3. 21 United States Code, Section 841.

4. 18 United States Code, Sections 2510, 2511, 2515, 2516, 2517, 2518.

5. Public Law 91-513, Title 3, Part B, Sections 1101 and 1105.

6. Rule 24, Federal Rules of Criminal Procedure

STATEMENT OF THE CASE

Robert Wollack appeals from a judgment of conviction entered on July 29, 1971 in the United States District Court for the Southern District of New York after an eight day jury trial before the Honorable David N. Edelstein, United States District Judge.

Indictment 71 CR 658, filed on June 22, 1971, charged Robert Wollack, Thomas Wollack, his brother, and Stanley Farrow, with three substantive counts in violation of 26 United States Code §4705(a) and 7237(b). That indictment also charged these three defendants, along

with Todd Everett, Charles Campos and George Hanold, named as co-conspirators but not as co-defendants, with conspiracy to violate these sections.

Trial of all defendants began on July 19, 1971 and ended on July 29, 1971. All defendants were found not guilty of the substantive counts, and Robert Wollack alone was found guilty of the conspiracy to violate 26 United States Code, §4705(a) and 7237(b).

On September 8, 1971, the Honorable David N. Edelstein sentenced Robert Wollack to a term of imprisonment for six years on a conspiracy count.

The following facts developed at petitioner trial.

On December 1, 1970, Todd Everett was arrested. On December 16, 1970 Charles Campos was arrested. On December 16, 1970 George Hanold was arrested. All three were arrested for violations of 26 USC §§4705(a) and 7237(b). Shortly after all three, in some degree, became informers for the Government.

On December 18, 1970, two days after his arrest, Hanold, together with Robert Wollack and Stanley Farrow, consulted with Robert Wollack's attorneys, Kane, Finger and Salaway, Esqs., in the office of the attorneys. The consultation involved the arrest of Hanold and the potential arrest of Robert Wollack, his brother Thomas, and Farrow. Unknown to Wollack, Farrow and their attorneys, Hanold, with the knowledge and assistance of the Government, had concealed an electronic device on his person and transmitted and recorded the entire conference

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between Wollack, Farrow and their attorneys. No Judge issued an order pursuant to 18 USC, §§2510 et seq, authorizing the interception of this oral communication.

On December 23, 1970 Robert Wollack was arrested for violation of 26 USC §§4705(a) and 7237(b). On February 26, 1971, a Grand Jury for the District Court for the Southern District of New York returned indictment No. 71 CR 230 charging Robert Wollack, Thomas Wollack, Stanley Farrow, Heorge Hanold, Todd Everett, and Charles Campos, with a conspiracy to violate 26 USC §§4705(a) and 7237(b). The indictment alleged no substantive counts against any defendant. It listed among the overt acts of the conspiracy the conversation between Robert Wollack, Stanley Farrow and their attorneys, recorded by the informer, George Hanold.

The court set arraignment for March 8, 1971, and trial for June 15, 1971. On the latter date, the case was continued until July 19, 1971 to permit substitution of new counsel for Thomas Wollack. On June 22, 1971 the Grand Jury for the District Court for the Southern District of New York returned indictment No. 71 CR 658 and the old indictment was not prosecuted. The second indictment charged substantive counts of sales of narcotics by Robert Wollack, Thomas Wollack, and Stanley Farrow to George Hanold, the informer. The indictment charged a new and broadened conspiracy continuing from January 1, 1970 up to and including the date of the indictment's filing on June 22, 1971. The second indictment listed the informers George Hanold, Todd Everett and Charles Campos as co-conspirators, but not as co-defendants. In the meantime, effective May 1, 1971, 26 USC §§4705(a) and 7237(

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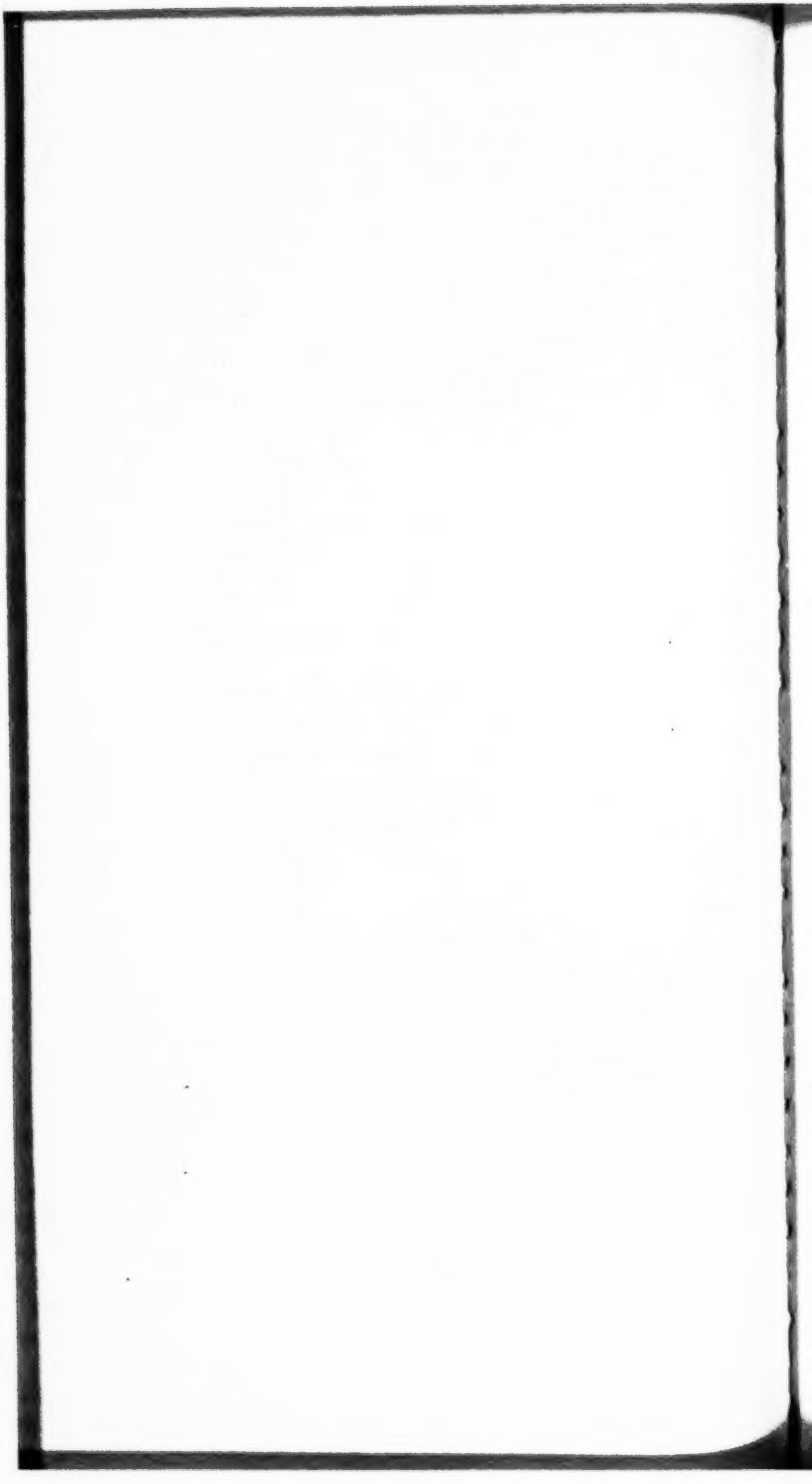
were repealed by Public Law 91-513. Also, effective that date, 21 USC, §§801 et seq replaced the repealed statutes.

The jury trial of Robert Wollac, Stanley Farrow and Thomas Wollack, before the Honorable David N. Edelstein, District Judge, began on July 19, 1971. The Government first called John Nault, an undercover narcotics investigator, employed by the Westchester County Sheriff's Department. Nault testified that he had purchased narcotics from Hanold, Everett and Campos. The Government then called James Harris, an undercover Special Agent for the Bureau of Narcotics and Dangerous Drugs. Harris testified that he had purchased narcotics from George Hanold. The prosecution then called Todd Everett, who admitted sales of narcotics to John Nault.

In the middle of defense counsel's cross-examination of Todd Everett on July 20, 1971, Court adjourned until 9:30 A.M. on July 21, 1971. On that morning, juror No. 5, Frank P. Doris, requested a meeting with the Trial Judge. In the presence of all counsel, Doris stated that he had reached an opinion based on compassion and that he no longer wished to sit in the case. The Trial Judge dismissed the juror and replaced him with alternate juror No. 1.

REASONS FOR GRANTING WRIT

I. If an indictment, filed June 22, 1971, charges a conspiracy continuing from January 1, 1970 up to and including the date of the indictment in violation of Title 26 U.S.C. §4705(a) and §7237(b), a statute repealed effective May 1, 1971, and replaced by Title 21 U.S.C. §§801 et seq, may defendant be tried and convicted for violating the repealed statute, and then sentenced under its provisions, when the repealed statute provides far greater penalties than the replacing statute.



This question raises two corollary issues:

1. That Wollack should have been tried under the new Act; and

2. That, even if tried and convicted under the old statute, he should have been sentenced under the new Act.

On February 6, 1971, the Grand Jury for the United States District Court for the Southern District of New York returned criminal indictment #71 CR 230. This indictment charged Robert Wollack and others with one count of conspiracy to violate 26 USC §§4705(a) and 7237(b) from January 1, 1970 continuing up to and including the date of the indictment.

On June 22, 1971, the first criminal indictment not having been dismissed, the Government filed a new indictment, 71 CR 658, alleging three substantive counts and one conspiracy count to violate 26 USC §§4705(a) and 7237(b), continuing from January 1970 up to and including the date of the second indictment.

On October 27, 1970, Congress enacted Public Law 91-513, the "Comprehensive Drug Abuse Prevention and Control Act of 1970." Public Law 91-513, Title III, §1101(b)(3)(A), effective May 1, 1971 repealed 26 USC 4705 and Public Law 91-513, Title III, §1101(b)(4)(A), effective May 1, 1971, repealed 26 USC §7237. Moreover, this statute included the "Controlled Substantive Act" (21 USC §§801 et seq).

Concerning the first issue, Wollack submits that since the Government choose to prosecute him under the new indictment, dated June 22, 1971, charging a conspiracy continuing up to and including that date, then he should have been tried under the new law, effective almost two months before the date of the indictment.

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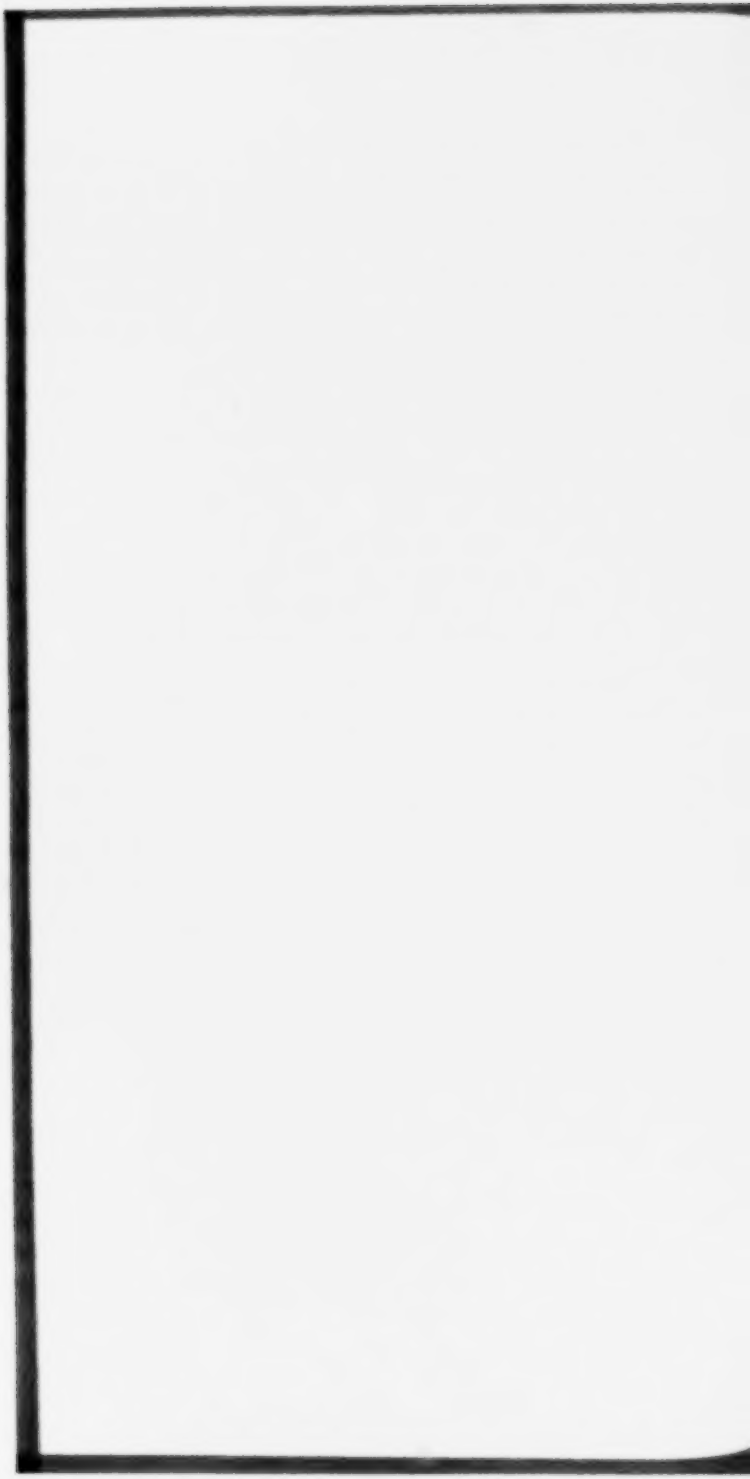
By prosecuting Wollack under a repealed statute for a crime allegedly committed months after that statute had been repealed and replaced by a new statute, Wollack was denied his right to be tried under a valid law. Furthermore, he submits that his conviction under the repealed law is null, void, and of no effect.

Had Wollack been tried and sentenced under 21 USC §801 et seq, as he should have been, his sentence might have been substantially less. The penalty for violating 26 USC §4705(a) requires imprisonment for a term of not less than five (5) and no more than twenty (20) years, and a possible fine of up to $20,000. Moreover, §7237(b) requires that upon a conviction of §4705(a) sentence shall not be suspended or probation granted.

The penalty provision of the new law, on the other hand, §21 USC 841, allows the Trial Judge a great deal more latitude. It calls for imprisonment of not more than fifteen (15) years and a possible fine of $25,000. It requires no minimum sentence, and suspended sentences or probation are allowed.

Concerning the second issue, Wollack submits that authority exists for the proposition that, even if tried and convicted under 26 USC, §§4705(a) and 7237(b), he should have been sentenced under the provisions of the new Act, 21 USC §841. Although the Second Circuit affirmed Wollack's appeal on this point on the basis of the United States v. Fiotto, Docket No. 71-1651, argued November 18, 1971, decision then reserved, and decided January 3, 1972, adversely to the defendants, the Ninth Circuit, on the other hand, faced the identical issue in the case of the United States v. Stephens,



449F.2d 108 (9th Cir. 1971) and on September 29, 1971, held that the defendant should be sentenced under the provisions of a new Act despite a conviction under an existing statute.

In Stephens, the Government sought mandamus to compel the sentencing trial judge to vacate his order of May 24, 1971, suspending sentence and placing the defendant on probation for violating 21 USC §176(a). This disposition, previously unauthorized by 26 USC §7237(d), the sentencing provision applicable to a violation of 21 USC §176(a), became permissible under the terms of the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, 84 Stat. 1236, effective May 1, 1971. The sole issue presented was whether the intervention of the effective date of the new Act before sentencing made probation permissible for offenses committed before the effective date of the new Act. Directly in conflict with the decision of the Second Circuit in Fiotto, in Stephens the Ninth Circuit held that even if the defendants were convicted of a violation of 21 USC §176(a), nevertheless the intervention of the effective date of the new Act between the commission of the crime and the imposition of the sentence permitted the application of the provisions of the new Act in sentencing the defendants.

Petitioner respectfully requests this Court to review this issue to resolve the conflict between the Second Circuit and the Ninth Circuit.

II. Does the presence of a "bugged" Government informer at a consultation between a defendant and his attorney deny that defendant his

Sixth Amendment right to counsel when the entire attorney-client consultation is recorded and used as evidence against the defendant at trial.

Many cases have held that once a defendant has been indicted, no statement made by him to an informer in the absence of counsel may be used against him. Messiah v. United States, 377 US 201 (1964). See also, Spano v. New York, 360 US 315 (1959).

Neither Spano nor Messiah involved an informer present during consultations between the defendant and his attorney. Hoffa v. United States, 385 US 293 (1966), however, involved this situation. Hoffa and other teamster officials were convicted of attempting to bribe members of a jury hearing their trial for violation of the Taft-Hartley Act (the Test Fleet trial). Partin, a local Union official, also under indictment, and a paid Government informer, had gained access to Hoffa's hotel suite, where Hoffa on occasion conferred with his attorney to plan trial strategy. At the bribery trial, Partin testified to several incriminating statements that Hoffa and others had made in his presence there.

On appeal, Hoffa contended Partin's presence in the hotel suite violated his Sixth Amendment rights, asserting the right of a defendant and his counsel to prepare for trial without intrusion by Government Agent on their confidential relationship. This Court rejected this argument, but only because none of Hoffa's incriminating statements heard by Partin were made in the presence of counsel, in the hearing of counsel, or connected in any way with the defense of the Test Fleet trial. All con-

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versations overheard involved the commission of a separate offense - attempted bribery of jurors - and all were made to Partin in the absence of any attorneys.

This Court, however, clearly implied that had there been any showing at all of Governmental intrusion into the attorney-client relationship, and had the Test Fleet case ended in the conviction rather than a hung jury, it would "presumptively have been set aside as constitutionally defective." Hoffa at page 307.

Although the cases cited above involved post-indictment Constitutional violations, in Black v. United States 385 U.S. 26 (1966) this Court considered an intrusion into the attorney-client relationship that occurred months before the indictment while the Government was still investigating the offense. In Black after certiorari had been denied, the Solicitor General advised the Court that on February 7, 1963, FBI Agents, in a matter completely unrelated to the Black case, had installed a listening device in the defendant's hotel suite. The device monitored and recorded conversations held there during the time the offense was being investigated, beginning some two months before and continuing until about one month after the Grand Jury heard the evidence. During that period, the Solicitor General advised that the monitoring agents overheard, among other conversations, exchanges between Black and his attorney, who was then representing him. Although neither memoranda nor reports of the conversation between Black and his attorney were seen by Tax Division attorneys prosecuting the case until January 1964 when in preparation of trial they were included in material transmitted to them; although the Tax Division attorneys examined and

retained the reports and memoranda until April 15, 1964, when trial began; and, although the Tax Division never realized until April 21, 1966 that any conversation between Black and his attorney had been overheard and included in the transcripts, by a Per Curium decision, this Court vacated the judgment of conviction and remanded the case to the District Court for a new trial.

The Black case, when considered with the Hoffa case, clearly stands for the proposition that absolutely no intrusion into the confidential relationship between an attorney and his client by a Government informer will be tolerated regardless whether the intrusion is pre-indictment or post indictment. Petitioner submits that the intrusion into the relationship between him and his attorney was far more prejudicial to his case and his constitutional rights than was the intrusion in Black. Petitioner believes that the District Court erred in holding that the petitioner's right to counsel guaranteed by the Sixth Amendment, was not violated by the recording of his consultation with his attorneys and the use of this recording at trial as evidenced against him.

III. Once a qualified juror has been seated, absent misconduct or physical or mental inability to continue, may a Trial Judge discharge the juror and substitute an alternate juror when, two days into the prosecution's case, the juror states he has reached an irrevocable verdict?

Most cases that have dealt with the discharge of a juror after the trial begins have arisen in a double jeopardy context. That is, once the court discovers that a juror has from the commencement of the trial been unqualified to sit, following the proper course, the court discharged the jury and declared a mistrial.

In these cases, the Government then retried the defendant who, in turn, claimed subjection to double jeopardy. Research discloses no cases in which an appellant court upheld the claim of double jeopardy when the Trial Court followed this procedure.

This Court has decided a number of cases in which after voir dire and after the jury was sworn, the Trial Court discovered that a member of the jury was not qualified to sit for one reason or another. In Thompson v. United States 155 U.S. 271 (1894) the jury had been sworn and witnesses examined, when the court learned that a juror was a member of the Grand Jury that indicted the defendant. Without the consent of the defendant, the court discharged the entire jury and directed a retrial. At the second trial, the defendant unsuccessfully claimed subjection to double jeopardy. In Simons v. United States 142 U.S. 148 (1891) a juror stated on voir dire that he was not acquainted with the defendant. Later, it was proved that he was and the District Attorney successfully moved for withdrawal of a juror. Again, on retrial, the defendant asserted double jeopardy without success.

Two additional recent cases parallel Thompson and Simons and affirm the procedure followed there. Wade v. Hunter 336 U.S. 684 (1949) and Downum v. United States 372 U.S. 734 (1963), repeat this dictum appearing in the earlier cases:

> And there have been instances where a Trial Judge has discovered facts during the trial which indicated that one or more members of a jury might be biased against the Government or the defendant. It is settled that the duty of the judge in this event is to discharge the

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jury and direct a retrial. Wade, at 689. See Also, Downum at 736; Simons at 154; Thompson, at 273-274.

In all of these cases, the trial court followed the proper procedure when it discovered that a juror had been untruthful on voir dire or was otherwise inherently unqualified to sit at the beginning of trial.

A variation of these cases would occur when a juror, again qualified in every respect at the beginning of trial, becomes, during the trial, unqualified to sit because he failed to obey an instruction of the court, for example, to refrain from reading or listening to news accounts of the trial or speaking to anyone about it. The mental or physical inability to continue as a juror would also be included. In these types of cases Rule 24 of the Federal Rules of Criminal Procedure provides for the discharge of the offending or unable juror and his replacement by an alternate. The Second Circuit affirmed this procedure in the case of United States v. Ellenbogen 365 F.2d 982 (2nd Cir. 1966) in which the Trial Judge excused a juror who became ill and replaced him with an alternate. The court held that the substitution of an alternate for reasonable cause is within the prerogative of the Trial Judge.

But neither of the cases cited above nor Rule 24 applies in the instant case. Here, a juror qualified in every respect to sit at the beginning and throughout the trial, well into the prosecution's case, decided that he had irrevocably reached a verdict in his own mind. At this point, the court faced three possible choices: 1) discharge the jury and declare a mistrial; 2) refuse to discharge the juror and continue the case; 3) discharge the

juror and substitute an alternate. Over defendant's objection the court chose the third.

Although no authority to support this position has been found, Wollack submits that the second choice was the correct procedure. He submits that once a qualified juror has been seated, he may not be discharged for any reason except either his physical or mental inability to continue or misconduct on his part. If through evidence presented and its effect on the juror, he feels that he has reached an irrevocable verdict, then that decision is part of the jury system. The decision of a juror, however premature, is a fault not of the juror but the jury system, and, as such, must be accepted.

Admittedly, according to authority drawn by analogy from Wade and the cases cited above, the first choice might also be considered proper. At least, by declaring a mistrial and directing a new trial, regardless of the juror's potential verdict, both Government and the defendant could be returned to their pretrial positions. As it was, however, in making the third choice, Wollack submits the trial judge erred, substantially prejudicing his case.

IV. Does Title 18 U.S.C. §§2510 et seq require judicial order authorizing the interception of an oral communication before that communication may be used as evidence?

The decision of United States v. White 401 U.S. 745 (1971) left unanswered many questions concerning the constitutionality of electronic surveillance of a conversation when a party to the conversation consents to interception of it. But because the conversations intercepted and overheard in White and Katz v. United

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States 389 US 347 (1967) occurred before the passage and effective date of USC §§2510 et seq, the Federal "Wiretap" Act, this court never reached the questions whether such conversations are now, in the absence of valid prior judicial order authorizing interception, privileged in character by statute and whether admission of such conversations into evidence would be in violation of 18 USC §§2510 et seq. Wollack submits that although White may have destroyed the Constitutional basis for one's expectation of privacy when an informer, a party to the conversation, uses a mechanical device to intercept one's oral communication, nevertheless the Government must comply with 18 USC §§2510 et seq before the intercepted communication may be used in evidence.

Wollack submits that the requirements of 18 USC §§2510 et seq must be complied with before this communication to his lawyer intercepted by the informer may be used in evidence against him. Since no order was entered allowing Hanold to intercept this communication, then the Federal Act forbids the use of the intercepted communication as evidence. The statutory analysis follows.

18 USC §2511 prohibits unauthorized interception and disclosure of any unauthorized interception. It prescribed penalties, exempting under subsection 2(c) persons acting under cover of law when that person is a party to the conversation. Under this section the Government claims authorization to intercept the Wollack communication and to use the result of the interception as evidence. But, that section does not "authorize" any interception merely because one of the parties to a conversation has given previous consent; its only effect is to make the unauthorized interception "not unlawful." Only 18 USC §2517(3) governs the

admissibility into evidence of the contents of an intercepted communication. And only communications intercepted in accordance with the statute may be disclosed by being admitted into evidence. Interception by a person under cover of law, a party to a communication, but without a court order, is not "intercepted in accordance with" as 18 USC §2517(3) requires. Such an interception is not authorized by 18 USC §2516 and, while making this type of interception not unlawful, 18 USC §2511(2)(c) does not "authorize" it as procedure. The only proper procedure to be followed if an intercepted communication is to be used as evidence is that set forth in 18 USC, §2518, requiring an application for a court order. In the absence of a court order, no intercepted communication may be used as evidence in a Federal Court.

Applying the Federal statute to this case, this conclusion is inevitable. Certainly, Robert Wollack's communication to his attorney fulfilled the definitions set forth in 18 USC §2510(2). One can hardly imagine any other circumstance in which a man was more justified in the expectation that his communication would be free from interception. Yet the entire consultation with his attorney was introduced into evidence against him. 18 USC §2510(4) defining "interception" doubtless includes the use of a "miniform recording device" and a "Kel Transmitter" carried by the informer, Hanold. Furthermore, as the District Attorney admitted, no order was entered authorizing the interception.

Accordingly, the electronically obtained tape recordings of Wollack's consultation with his attorney should have been suppressed on the grounds that the introduction into evidence against the defendant violated his statutory rights as set forth in 18 USC §§2510 et seq.

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CONCLUSION

The petition for a writ of certiorari should be granted for the above reasons.

Respectfully submitted,

ROBERT WOLLACK, JR.

By: /s/ Frederick T. Stant, Jr.
His Attorney

Frederick T. Stant, Jr.
STANT & STANT
1230 Virginia National Bank Bldg.
Norfolk, Virginia 23510

APPENDIX

APPENDIX

STATUTES INVOLVED

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed

of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

26 UNITED STATES CODE §4705

(a) General Requirement. - It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary of his delegate.

26 UNITED STATES CODE §7237

(b) Sale or other transfer without written order. - Whoever commits an offense, or conspires to commit an offense, described in §4705 (a) or §4742(a) shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a second or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000. If the offender attained the age of 18 before the offense and -

(1) The offense consisted of the sale, barter, exchange, giving away, or transfer of any narcotic drug or marihuana to a person who had not attained the age of 18 at the time of such offense, or

(2) The offense consisted of a conspiracy to commit an offense described in paragraph (1), the offender shall be imprisoned not less than 10 or more than

40 years and, in addition, may be fined not more than $20,000.

(d) No suspension of sentence; no probation; etc. - Upon conviction -

(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or

(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense,

the imposition or execution of sentence shall not be suspended, probation shall not be granted and in the case of a violation of a law relating to narcotic drugs, section 4202 of Title 18, United States Code, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24-201 and following), as amended, shall not apply.

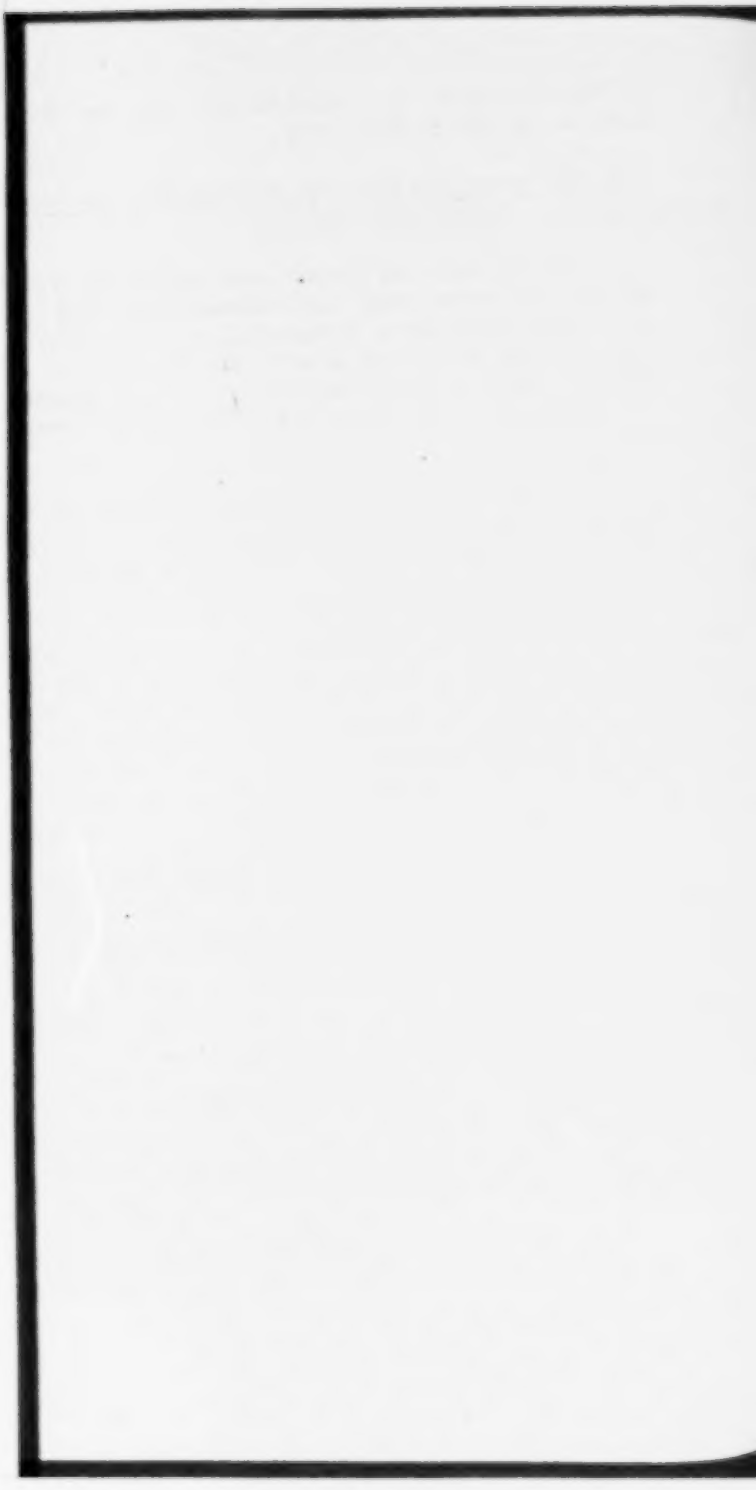
21 UNITED STATES CODE SECTION 841

Prohibited Acts A - Unlawful Acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or



dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this Title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both.

18 UNITED STATES CODE §2510

Definitions

As used in this chapter -

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

18 UNITED STATES CODE SECTION 2511

Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who -

(a) wilfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

18 UNITED STATES CODE SECTION 2515

Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 UNITED STATES CODE SECTION 2516

Authorization of interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such

interception may provide or has provided evidence of -

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(g) any conspiracy to commit any of the foregoing offenses.

18 UNITED STATES CODE SECTION 2517

Authorization for disclosure and use of intercepted wire or oral communications

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

18 UNITED STATES CODE SECTION 2518

Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent

jurisdiction and shall state the applicant's authority to make such application

PUBLIC LAW 91-513, TITLE 3, PART B

Repeals

Sec. 1101. (a) The following provisions of law are repealed:

(b) (3) (A) Subchapter A of chapter 39 of the Internal Revenue Code of 1954 (relating to narcotic drugs and Marihuana) is repealed.

(B) The table of subchapters of such chapter 39 is amended by striking out "Subchapter A. Narcotic drugs and marihuana."

(4) (A) Sections 7237 (relating to violation of laws relating to narcotic drugs and to marihuana) and 7238 (relating to violation of laws relating to opium for smoking) of the Internal Revenue Code of 1954 are repealed.

Sec. 1105. (a) Except as otherwise provided in this section, this title shall become effective on the first day of the seventh month that begins after the day immediately preceding the date of enactment.

RULE 24, FEDERAL RULES OF CRIMINAL PROCEDURE

Trial Jurors

(c) Alternate Jurors. The court may direct that no more than six jurors in addition to the regular jury be called and impanelled to sit

as alternate juror. Alternate jurors in the order in which they are called shall replace jurors who prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examinations and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to one premptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impanelled, two peremptory challenges if three or four alternate jurors are to be impanelled, and three peremptory challenges if five or six alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circ... the United States Courthouse in the City of New York, on the fifth January one thousand nine hundred and seventy-two.

Present:

HON. J. EDWARD LUMBARD

HON. PAUL R. HAYS

HON. WALTER R. MANSFIELD

Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Robert Wollack,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States Di... for the Southern District of New York, and was argued ...

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and ... the judgment of said District Court be and ... affirmed.

A. DANIEL FUSARO
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-992

ROBERT WOLLACK, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment of the court of appeals was rendered without opinion.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1972. The petition for a writ of certiorari was filed on February 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

ISSUES PRESENTED

1. Whether a conspiracy to violate 26 U.S.C. (1964

ed.) 4705(a) and 7237(b) can be prosecuted subsequent to their repeal when the acts alleged to constitute the conspiracy took place prior to repeal.

2. Whether the sentencing provisions of 26 U.S.C. (1964 ed.) 7237(b) remain in force with respect to violations of 26 U.S.C. (1964 ed.) 4705(a) and 7237(b) taking place prior to repeal of these statutes.

3. Whether a recorded conversation involving petitioner, two attorneys, and a government informer who consented to the recording, was properly admitted into evidence under 18 U.S.C. 2517(3).

4. Whether the district court erred in discharging a juror and substituting an alternate juror when, during the prosecution's case, the juror requested to be excused on the ground that he had reached a verdict and could not continue with an open mind.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to violate federal narcotics laws, 26 U.S.C. (1964 ed.) 4705(a) and 7237(b), and was sentenced to imprisonment for six years under 26 U.S.C. (1964 ed.) 7237(b). The court of appeals affirmed without opinion.

Prosecution was based on a four-count indictment filed June 22, 1971.[1] Prior to the filing of this indict-

[1] Petitioner's Appendix in the court of appeals (hereafter App.), pp. 7-12. The conspiracy charged was alleged to have existed "[f]rom on or about the 1st day of January, 1970 and continuously thereafter up to and including the date of the filing of this indictment" (App. 10). This indictment superseded one filed on February 26, 1971, which had similarly alleged the existence of a

ment Congress had repealed 26 U.S.C. (1964 ed.) 4705 (a) and 7237(b), effective May 1, 1971.[2] At the beginning of the trial, the government stipulated that it would offer no proof of any events occurring beyond May 1, 1971 (App. 15); no such proof was in fact offered and the court's charge to the jury contained the instruction that "there is no evidence that the conspiracy alleged by the government continued beyond the end of 1970" (App. 43).

The evidence at trial established that during 1970 petitioner, a New York City police officer, had been engaged in the business of selling narcotics at wholesale. Petitioner sold narcotics to Mr. George Hanold, among others; Mr. Hanold on several occasions bought cocaine from petitioner on consignment and distributed it at retail himself, or on some occasions, in partnership with others. Mr. Hanold was arrested on December 16, 1970, and at that time agreed to cooperate with the government as an informer; on December 18, 1970, he was equipped with a recording device and met with petitioner, who took him to the law offices of Kane, Salaway and Finger. The conversation which occurred at that meeting was recorded and subsequently introduced into evidence.[3] The conversation reveals that the purpose of the meeting was to arrange suitable

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conspiracy "up to and including the date of this indictment" (App. 5).

[2] P. L. 91-513, Section 1101(b), 84 Stat. 1292. The successor provisions are found at 21 U.S.C. 801 *et seq.*

[3] The transcript (hereafter App. Tr.) of the recorded conversation, as admitted into evidence, is set out at the end of App. and is separately paginated.

representation for Mr. Hanold in light of his arrest (App. Tr. 4, 25, 27, 29, 30, 31, 33, 37, 38, 46, 49); much of the discussion concerned the circumstances of Mr. Hanold's arrest and arraignment (App. Tr. 3, 5-6, 11, 21, 26). Petitioner's concern during the discussion was not how he personally should be advised legally but rather how he could thwart legitimate investigations and prosecutions of his own criminal activity and that of others (App. Tr. 8, 10, 14-17, 29-30, 33-34, 38, 47). The only "advice" given to petitioner by the attorneys was that his suggestion that a certain alleged informer be killed was "premature" (App. Tr. 17).

During the presentation of the government's case at trial, one of the jurors informed the court that he had reached a verdict and could not continue to hear the evidence in the case with an open mind (App. 19). The juror requested to be excused because he felt he could not be fair (App. 24); the court excused him (App. 26) and appointed an alternate juror to take his place (App. 28).

ARGUMENT

1. Petitioner contends that a conspiracy to violate 26 U.S.C. (1964 ed.) 4705(a) and 7237(b) cannot be prosecuted subsequent to May 1, 1971, the effective date of the repeal of those provisions, even though the acts alleged to constitute the conspiracy all took place prior to that date (Pet. 6-8).[4] This contention has no merit.

[4] Although it is not entirely clear, petitioner's argument may be read as also challenging the sufficiency of the indictment, on the ground that it alleged continuation of the conspiracy beyond the repeal date. However, since the evidence was limited to the period

In repealing Sections 4705(a) and 7237(b), Congress expressly provided that "[p]rosecutions for any violation of law occurring prior to [May 1, 1971] shall not be affected by the repeals or amendments made by [this Act], or abated by reason thereof" (P. L. 91-513, Section 1103(a), 84 Stat. 1294). Furthermore, even in the absence of such a specific saving clause prosecutions could be maintained on the authority of the general statutory saving clause, 1 U.S.C. 109. *United States* v. *Smith*, 433 F. 2d 341 (C.A. 4), certiorari denied, 401 U.S. 942; *United States* v. *Brown*, 429 F. 2d 566 (C.A. 5).

2. Petitioner further contends that the sentencing provisions of 26 U.S.C. (1964 ed.) 7237(b) do not remain in force with respect to violations occurring prior to May 1, 1971, citing *United States* v. *Stephens*, 449 F.2d 103 (C.A. 9), and arguing that even if he was properly prosecuted he should have been sentenced under 21 U.S.C. 841, the successor provision to 26 U.S.C. (1964 ed.) 7237(b) (Pet. 8-9). However, *Stephens* does not support petitioner's contention, for in that case the court did not question a conviction and sentence under 21 U.S.C. (1964 ed.) 176a, which was repealed at the same time as 26 U.S.C. (1964 ed.) 4705(a) and 7237(b),[5] even though the sentence was imposed after the effective date of repeal; the holding in

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of time during which the statutes were still in force and the jury was so instructed, petitioner suffered no prejudice and was properly convicted under the indictment. Cf. *United States* v. *Baker*, 419 F. 2d 88 (C.A. 2), certiorari denied, 397 U.S. 976; *United States* v. *Postma*, 242 F. 2d 488, 497 (on petition for rehearing) (C.A. 2), certiorari denied, 354 U.S. 922.

[5] P. L. 91-513, Section 1101(a), 84 Stat. 1291.

Stephens was that the repeal of 26 U.S.C. (1964 ed.) 7237(d), which had prohibited the granting of probation or of suspended sentences in certain cases involving violations of the narcotics laws, permitted the suspension of that sentence and the release of the defendant on probation, an issue not present in this case. The imposition of a penalty under a sentencing provision should be comprehended within the meaning of the word "prosecutions" in the saving clause expressly provided by Congress in repealing Section 7237(b);* whether it is or not, however, sentencing provisions do clearly come within 1 U.S.C. 109 which provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty * * * unless the repealing Act shall so expressly provide." Therefore, the sentencing provision of 26 U.S.C. (1964 ed.) 7237(b) did remain in force for violations, such as that committed by petitioner, occurring prior to May 1, 1971. *United States* v. *Fiotto,* C.A. 2, Nos. 71-1651, 71-1689, 71-1690, decided January 4, 1972, petition for writ of certiorari pending, No. 71-1114, this Term.

3. Petitioner contends that a recorded conversation involving petitioner, two attorneys, and a government informer who consented to the recording, was not admissible into evidence under 18 U.S.C. 2517(3) or, alternatively, that its admission into evidence violated his right to counsel under the Sixth Amendment (Pet. 9-12, 15-17). Petitioner's argument under the statute rests upon the absence of a prior judicial order authorizing interception of the conversation. However, such an order is not required by the statute when one

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* P. L. 91-513, Section 1103(a), 84 Stat. 1294, quoted *supra.*

of the participants to the conversation consents to its recording, 18 U.S.C. 2511(2)(c) and (d); since Mr. Hanold consented in advance to the recording, it was properly admissible into evidence under 18 U.S.C. 2517 (3). See *United States* v. *Puchi*, 441 F. 2d 697, 700 (C.A. 9), certiorari denied, 404 U.S. 853. Introduction into evidence of a recorded transcript under such circumstances did not violate petitioner's Fourth Amendment rights, *United States* v. *White*, 401 U.S. 745, and petitioner does not contend otherwise.

Petitioner seeks to avoid the consequences of *White* by alleging that the participation in the conversation by two attorneys raises a Sixth Amendment bar to its admissibility. This argument is deficient. The transcript of the conversation reveals that it did not involve any attorney-client relationship between petitioner and the two attorneys who were present. The participation by the attorneys was limited to a preliminary consultation with Mr. Hanold, who had been arrested two days previously. Petitioner, who had not been arrested, was not there seeking legal advice; he was present because he was concerned with the consequences to himself which might result from Mr. Hanold's arrest and how they could be avoided, either through Mr. Hanold's legal defense or through extra-legal means. Since no attorney-client relationship was involved between petitioner and the attorneys, and petitioner was not seeking legal assistance for himself, no issue is in fact presented with respect to his right to counsel.[7] Moreover,

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[7] It may be relevant here to note that because of the presence of a third person, and also due to the fact that at the time of and during the conversation the attorneys were not acting in a professional capacity as to petitioner, the common law attorney-client

this Court has never held that pre-accusatory investigations, conducted prior to taking a suspect into custody, constitute a prosecutorial "critical stage" which invokes the Sixth Amendment guarantee of assistance of counsel.

4. Petitioner further contends that the district court erred in discharging a juror and substituting an alternate juror under Rule 24, Fed. R. Crim. P., when, during the prosecution's case, the juror requested to be excused on the ground that he had reached a verdict and could not continue with an open mind (Pet. 12-15). Rule 24(c) provides that "[a]lternate jurors * * * shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties." It is not an abuse of the district court's discretion to find a juror who reaches a final conclusion after hearing only part of the evidence to be "unable or disqualified to perform [his] duties" and to dismiss him and replace him with an alternate. See *United States* v. *Virginia Erection Corp.*, 335 F. 2d 868, 873 (C.A. 4). Petitioner has not established that the procedure followed by the district court was prejudicial to him and therefore he is not entitled to a new trial. *United States* v. *Zambito*, 315 F. 2d 266 (C.A. 4), certiorari denied, 373 U.S. 924 (holding that there is no prejudice in "the exclusion of a juror whom [defendant] may or may not have thought biased in his favor"; *id.* at 269).

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privilege would not protect against divulgence of the contents of the conversation even if an attorney-client relationship had existed. See, *e.g.*, *Himmelfarb* v. *United States*, 175 F. 2d 924 (C.A. 9), and *Pollock* v. *United States*, 202 F. 2d 281 (C.A. 5).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT E. LINDSAY,
Attorneys.

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